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**Issue Date: 14 September 2005**

CASE No.: 2003-BLA-05576

In the Matter of

**CARL M. YATSKO**

Claimant

v.

**CONSOLIDATED RAIL CORPORATION**

Employer

and

**DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS**

Party-in-Interest

**DECISION AND ORDER**  
**(UPON REMAND BY THE BENEFITS REVIEW BOARD)**

This proceeding is before me on remand from the Benefits Review Board. On February 9, 2004, I issued a Decision and Order denying benefits to Claimant, Carl M. Yatsko. I found Claimant did not establish that his jobs as a trainman and conductor for Central Railroad of New Jersey, Lehigh Valley Railroad and Consolidated Railroad Corporation (Conrail) from 1961 through 1997 were qualifying coal mine employment because the evidence was insufficient to establish either the function or situs prongs of the test to determine whether Claimant was a miner. *See Elliot Coal Mining Co., v. Director, OWCP*, 17 F.3d 616 (3<sup>rd</sup> Cir. 1994). I also found Claimant had established the presence of pneumoconiosis but he did not establish that such pneumoconiosis arose out of coal mine employment nor did he establish total disability due to pneumoconiosis.

On February 17, 2005, the Benefits Review Board (Board) issued a Decision and Order. The Board found that I erred in focusing on the status of the coal with which Claimant was involved (most of Claimant's work was with processed coal) rather than the specific duties in the jobs Claimant performed for Conrail and its predecessors. The Board stated the appropriate inquiry is whether the work Claimant performed falls within the definition of coal preparation, which includes loading coal at the coal preparation facilities. The Board noted that the Third Circuit has held that "removal of coal from the tipples is a 'necessary' part of the preparation of coal for transport into the stream of commerce... participation in the removal of the coal from the

tipple [is] a step, if only the very last step, in the preparation of the coal.” *Hanna v. Director, OWCP*, 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988). The Board remanded for reconsideration of the evidence relevant to the issue of coal mine employment, specifically to reconsider whether Claimant’s duties constituted qualifying coal mine employment and the length of time spent at these duties.

The Board also noted that if, on remand, I find the evidence of record sufficient to establish that Claimant is a miner as defined by the Act and regulations, I must then address the Director’s contention that the Director has not fulfilled his obligation of providing Claimant with a complete pulmonary evaluation under 20 CFR § 725.406. Specifically, the Director contends that the opinion of Dr. Dittman is based on an inaccurate picture of the length of Claimant’s coal mine employment and, therefore, does not credibly address all of the necessary elements of entitlement.

The Board also found that I must also reassess the medical evidence in light of my findings regarding the length of Claimant’s coal mine employment. Specifically, depending on the findings on the length of Claimant’s coal mine employment, the Board directed me to reconsider the findings under Section 718.203 regarding the etiology of Claimant’s pneumoconiosis. In addition, the Board also found I should review the evidence relevant to a finding of total respiratory disability pursuant to Section 718.204(b)(2). The Board found I erroneously characterized the results of the September 6, 2002 pulmonary function study. The Board vacated my findings under Section 718.204(b)(2)(i). In addition, since my findings under subsection 718.204(b)(2)(iv) were based, in part, on my weighing of the pulmonary function study results, the Board also vacated my findings under Section 718.204(b)(2)(iv) and remanded for further consideration. Finally, the Board found that if I found the evidence sufficient to establish a totally disabling respiratory impairment, I must then reassess the medical evidence regarding the cause of Claimant’s disability. In particular, the Board directed me to reconsider the probative values of medical opinion of Dr. Levinson in light of the fact that Dr. Levinson did not diagnose the existence of pneumoconiosis, contrary to my findings on that issue. The Board stated I should also reassess Dr. Dittman’s medical opinion concerning the cause of Claimant’s respiratory disability, including any clarifications to Dr. Dittman’s opinion that may result on remand. The record was returned on May 6, 2005. Briefs were filed by August 5, 2005.

Claimant testified about his work history at the hearing held before me on October 7, 2003. He began work for Central Railroad of New Jersey in 1961. He worked as a trainman and as a conductor. His work as a trainman included “making up trains” and then riding trains from point A to point B. As a conductor he did similar work but he was in charge of a five man crew. At points he worked at Pier 18 in Jersey City where coal cars filled with processed coal were being loaded onto barges or ships. Here he worked drilling cars out, cleaning empty coal cars and making trains.

In 1972, Claimant continued to perform similar work in the same position for Lehigh Valley Railroad. During this employment, he worked making trains at the tipples where the coal companies were loading coal into cars. He also cleaned cars which had carried coal. He worked at General breaker, Shaft breaker, Beaver Brook breaker and Humboldt tipple.

In 1976, Conrail took over the railroad company and Claimant performed similar duties for Conrail until he retired in 1997. He dumped coal out of coal cars when getting the empty cars together to return them. At times, he worked at the coal yards, breakers, or tipples classifying cars, or making up trains. He would spend about an hour getting the train ready to go, including knocking off the hand breaks on each car, coupling the air hoses, and pulling the cars out. When he rode the trains from the coal yard, breaker or tipple, he was exposed to coal dust if he rode in the caboose at the back of the train. When he worked at the Ashley rail yard, the Yuber breaker was right alongside the rail yard with only a chain link fence to separate the two work areas (Tr. 9-25).

In a statement prepared on July 18, 2002, Claimant stated he performed railroad employment duties at tipples, breakers, and preparation plants. While working for Central Railroad of New Jersey, he worked on trains which hauled coal from the Wanamie tipple to the Huber breaker. Other work, however, involved trains which hauled coal from one rail yard to another rail yard. Claimant stated he was sometimes exposed to coal mine dust on a daily basis and sometimes a few times a week. In addition, he was sometimes exposed all day, and sometimes exposed to coal mine dust only for a few hours. His work on Pier 18 at Jersey City included getting coal cars ready for shipment overseas (CX 3).

When working at Lehigh Valley railroad, he worked on trains that hauled coal from various breakers to train yards. He also worked on trains that hauled coal from one rail yard to another rail yard. Claimant stated he was sometimes exposed to coal mine dust on a daily basis and sometimes a few times a week. In addition, he was sometimes exposed all day, and sometimes exposed to coal mine dust only for a few hours. Similarly, at Conrail he also worked on trains that hauled coal from the breakers, preparation plants, or tipples to power plants and to rail yards. Again, Claimant stated he was sometimes exposed to coal mine dust on a daily basis and sometimes a few times a week. In addition, he was sometimes exposed all day, and sometimes exposed to coal mine dust only for a few hours (DX 3).

On review of Claimant's testimony and statements, it is clear that some of Claimant's employment with the three rail companies involved work duties that are considered coal mine employment. Specifically, Claimant's work cleaning empty coal cars and delivering the empty cars to the tipples and/or breakers is coal mine employment. *Hanna, supra*. In addition, Claimant's work for Central Railroad of New Jersey on trains hauling coal from the Wanamie tipple to the Huber breaker was coal mine employment since the coal was not yet in the stream of commerce. The problem is, however, that Claimant's estimates as to how often he performed these duties as opposed to other duties which are not covered coal mine employment, but which often exposed him to coal dust, are general and vague.

Claimant's work for Central Railroad of New Jersey at Pier 18 is not covered coal mine employment since that coal was already in the stream of commerce. However, he also worked some between 1961 and 1972 cleaning train cars and returning the empty cars to the tipples which would be covered. There is no statement in the record, however, that indicates how often Claimant performed this covered coal mine employment during the years 1961 to 1972. Claimant's work between 1972 and 1976 was similar. Thus, some of his work involved coal mine employment and some of his work did not. There is no statement in the record, however,

that indicates how often Claimant performed the duties that are considered coal mine employment between 1972 and 1976.

Claimant stated he worked up to one hour in the Wanamie tipple yard during the years he worked for Conrail. In addition, he worked classifying cars at the Ashley yard which included making up trains of the empty cars to return to the coal breakers. Work on these two jobs included duties that are covered coal mine employment. His third job, however, involved taking trains to Allentown from the rail yards. There is no evidence this job task included any duties that are covered coal mine employment since the coal on these trains was already in the stream of commerce. There is nothing in the record, however, that establishes what amount of time he worked on the first two jobs which included coal mine employment as opposed to the third job which did not include coal mine employment.

Thus, I find the record establishes Claimant performed some duties between 1961 and 1997 which are considered coal mine employment. I find further, however, there is insufficient evidence of record to establish whether or not Claimant worked in coal mine employment 125 'working days' in any particular year. *See 20 CFR §725.101(a)(32)*. While it is clear that some of Claimant's employment from 1961 to 1997 was coal mine employment, there is no evidence to evaluate to ascertain how much of the Claimant's yearly salary each year he worked was for coal mine employment as opposed to for his employment which is not coal mine employment. In this unique situation, I have determined that it is appropriate to find one-fourth of Claimant's employment for Central Railroad of New Jersey and Lehigh Valley was coal mine employment. Claimant worked making up trains including empty coal cars, worked at Pier 18 in Jersey City, worked riding trains from point A to point B and worked making trains that carried freight during this employment. Thus one-fourth of his job duties was covered coal mine employment. Accordingly, I find Claimant worked four years in coal mine employment between 1961 and 1976. From 1976 to his retirement in 1997, however, two of the three jobs Claimant worked on included covered coal mine employment. Similarly, I find under the unique situation of this case, Claimant worked fourteen years in coal mine employment between 1976 and 1997. Accordingly, I find Claimant has established a total of eighteen years of coal mine employment consisting of his work for the railroads running trains from the tipple to the breaker, drilling empty cars, making trains of empty coal cars and running them to the tipples or breakers, and the hour of work spent preparing trains to begin transportation of coal from the tipple to power plants, other railroad yards or to other towns.

The Director moved for remand in this case once a determination of the length of coal mine employment has been reached. Specifically, the Director argues the examination report by Dr. Dittman does not meet the statutory requirement for the Department of Labor to give the miner a complete pulmonary evaluation. 20 CFR §725.406. Dr. Dittman based his opinion on Claimant's coal dust exposure on an employment history encompassing all of Claimant's railroad career of thirty-seven years rather than the eighteen years of employment which Claimant has established was coal mine employment. The Director argues that Dr. Dittman's opinion is incomplete because he did not distinguish between Claimant's dust exposure in covered and non-covered employment and, therefore, his opinion does not credibly address a condition of entitlement. The Director argues further that, therefore, the case should be remanded to allow the Department to clarify Dr. Dittman's opinion. On review of Dr. Dittman's

medical opinion, it is clear that he considered Claimant's entire railroad employment as coal mine employment. Therefore, his opinion does not establish whether or not Claimant's actual coal mine employment of eighteen years is the cause of the changes seen on chest x-ray and pulmonary testing. Accordingly, I agree that the pulmonary evaluation provided to Claimant is incomplete as to the issue of the etiology of Claimant's pulmonary changes. I find it is appropriate, therefore, to remand this matter to the district director with instructions to ask Dr. Dittman to clarify whether Claimant's coal mine employment as established above has caused the pulmonary changes noted in his medical opinion.

### ORDER

It is ordered that the claim of Carl M. Yatsko be remanded to the district director for purposes of obtaining clarification from Dr. Dittman on the issue of the etiology of Claimant's pulmonary changes noted in his medical opinion report of September 10, 2002.

**A**

RALPH A. ROMANO  
Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).